IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

WEALTH TAX REFERENCE No. 112 of 1995
With
WEALTH TAX REFERENCE No. 117 of 1995
With
WEALTH TAX REFERENCE No. 121 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG
HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF WEALTH TAX - Applicant(s)
Versus
MINALBEN RAMESHBHAI JHAVERI L/H OF SMT.MANORAM B. DALAL & 3 - Respondent(s)

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Appearance :
MR MANISH R BHATT for Applicant
MR MANISH J SHAH for Respondents

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

and

HONOURABLE MR.JUSTICE M.R. SHAH

Date : 24/08/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

1. At the instance of the Revenue, the Income-tax Appellate Tribunal, Ahmedabad Bench “B” has made the above-mentioned three References. Wealth-Tax Reference No. 112/95 relates to Wealth Tax Appeals no. 520, 522 and 523/Ahd./84 relating to assessment years 1970-71, 1972-73 and 1973-74. W.T.R. No. 117/95 relates to Sales Tax Appeal No. 521/Ahd./84 relating to assessment year 1971-72, while W.T.R. No. 121/94, relates to the Sales Tax Appeals No. 385, 386 and 387/Ahd/90 pertaining to the assessment years 1979-80, 1980-81 and 1981-82.
2. In W.T.R. No. 112/95, the following question of law has been referred by the Income-tax Appellate Tribunal for the opinion of this Court.

   “Whether the appellate Tribunal has been right

in law and on facts in holding that the rectification order by the Sales-tax Officer was not justified?”

In W.T.R. No. 117/95, the following questions have been referred by the Tribunal for the opinion of this Court.

1. Whether the Tribunal has been right in law and on facts in holding that the rectification order by the WTO was not justified?
2. Whether the Tribunal has been right in law and on facts in following the decision of the Gujarat High Court in the case of Kikabhai Bhagubhai, 72 ITR 586 when the said decision was not directly applicable to the facts of the case?
3. Whether the Tribunal has not erred in law and on facts in not considering that the valuation of the quoted shares held in stock in trade was required to be made as per the provisions of sec.7[1] read with Rule 2[b][ii] at market value and hence there was a

clear error apparent on record which was capable of rectification?

In W.T.R. No. 121/94, the following questions are referred by the Tribunal for opinion of this Court.

1. Whether, the Tribunal is right in law and on facts in directing the WTO to adopt the value of shares as per the book value?
2. Whether, the Tribunal is right in law and on facts in holding that the rectification made by the WTO u/s 35 of the Wealth-tax Act was invalid?

3. As the matters are in relation to the same assessee, but the assessment years are different, and the questions virtually are identical, we propose to dispose of these three References by this common judgment. Undisputed facts are that the Wealth-tax assessment for the assessment years 1970-71, 1972-73 and 1973-74 were made by the Sales Tax Officer, but later on realizing that he had made a mistake in not noticing Rule 2B of the Rules, which came into

force from 1963, he accordingly proposed to exercise his jurisdiction under Section 35 of the Wealth-Tax Act and consequently issued notice to the assessee. The assessee appeared before the Wealth-tax Officer and raised many objections including the objection that the Wealth-tax Officer was not bound to adopt the valuation procedure laid down under Sec. 7[2][a] as he had discretion to go for valuation procedure provided under Section 7[1] of the Wealth-tax Act. The argument did not find favour with the Wealth-tax Officer and he accordingly rectified the order and in accordance with the mandatory language employed in Rule 2B[2] of the Rules observed that if there was a difference of more than 20 per cent in the book value and the market value of the shares, then, the market value prevalent during assessment year would be taken to be true value of the assets/wealth. Being aggrieved by the said order of the Wealth-tax Officer, the assessee took up the matter before the Commissioner, Wealth-tax. The Commissioner,

Wealth-tax observed that the Wealth-tax Officer was entitled to exercise his jurisdiction conferred upon him under Section 35 of the Wealth-tax Act in view of the mandatory language employed in Rule 2B[2] of the Rules. He accordingly dismissed he appeal. The assessee, still dissatisfied, took up the matter before the Tribunal. It was contended before the Tribunal that as a Division Bench of this Court in the matter of **Kikabhai Bhagabhai Vs. CIT, [1969 72 ITR 586]** has observed that it would be open to the Wealth-tax Officer to proceed under Section 7[2][a] or under Section 7[1] of the Act and if he has proceeded after exercising his option, then, there would be no scope for exercise of powers under Section 35 of the Wealth-tax Act. It was contended before the Tribunal that the Division Bench of this Court was considering the scope of Section 7[1] and of Section 7[2][a] of the Wealth-tax Act and as Rule 2B[2] was never presented before the Court for consideration, the judgment was of no help.

4. Learned Tribunal, though observed that in the

matter of Kikabhai [supra] Rule 2B[2] was not mentioned, as it came into existence in the year 1965, but still the judgment would operate, because, it was delivered in the year 1968. It accordingly allowed the appeal and held that the order under Section 35 of the Wealth-tax Act could not be passed. The Revenue, being aggrieved by the said judgment and the other judgments, wherein first judgment was followed for granting appeal in favour of the assessee, made separate Reference Applications, the Tribunal has accordingly made the above-referred References.

5. Mr. M.R. Bhatt, learned counsel for the Revenue submits that the approach of the learned Tribunal in applying the judgment of Kikabhai [supra] to the facts of the present case was not only illegal but was in perverse exercise of jurisdiction. He submits that the judgment would be an authority in relation to Section 7[1] and 7[2][A] of the Wealth-tax Act and not in relation to Rule 2B[2]. His further submission is that the Rule came into existence in the year

1965, therefore, the judgment of Kikabhai [supra], which was in relation to the assessment years 1962-63 wold not be applicable to the facts of the case. It was lastly submitted that in view of the mandatory language employed in Rule 2B[2] and on detection of the illegality/wrong committed by the Wealth-tax Officer, the Wealth-tax Officer was entitled to exercise jurisdiction conferred upon him under Section 35 of the Act. Mr. Shah, learned counsel for the asessee vehemently opposed the submissions made by the learned counsel for the Revenue. According to him, the language in which the section is couched, would make it clear that it is not mandatory or imperative on the Wealth-tax Officer to take the market value of the assets/wealth/shares if the difference between the book value and the market value is more than 20 per cent. He submits that the Tribunal was absolutely justified in holding that the present was not a case for exercise of jurisdiction conferred upon the Wealth-tax Officer under Section 35 of the Act.

6. For proper appreciation of the arguments, it would be necessary to refer to Rule 2B. It is to be noted that the said Rule was introduced in the statute book somewhere in the year 1965 and was deleted with effect from 1.4.89. Undisputedly, the periods of the assessment in dispute are ranging between 1965 and 1989. Prior to its omission, Rule 2B read as under:-

> “Prior to its omission, rule 2B reads as under:-
>
> [1] The value of an asset disclosed in the balance sheet shall be taken to be__
>
> [a] in the case of an asset on which depreciation is admissible, its written down value;
>
> [b] in the case of an asset on which no depreciation is admissible, its book value;
>
> [c] in the case of closing stock, its value adopted for the purposes of assessment under the Income-tax Act, 1961, for the previous year relevant to the corresponding assessment year.

[2] Notwithstanding anything contained in sub-rule[1] where the market value of an asset exceeds its written down value or its book value or the value adopted for the purposes of assessment under the Income-tax Act, 1961, as the case may be, by more than 20 per cent, the value of that asset shall, for the purposes of rule 2A, be taken to be its market value."

Rule 2B[1] relates to value of an asset disclosed in the balance sheet which shall be taken to be in case of an asset on which depreciation is admissible, its written down value; in case of an asset on which no depreciation is admissible, its book value and in case of closing stock, its value adopted for the purposes of assessment under the Income-tax Act, 1961, for the previous year relevant to the corresponding assessment year. Sub-rule [2] of Rule 2B starts with the obstante clause and therefore, it will have its operation independent of sub-rule [1] of Rule 2B. According to sub-rule [2] of Rule 2B,

notwithstanding anything contained in sub-rule[1] where the market value of an asset exceeds its written down value or its book value or the value adopted for the purposes of assessment under the Income-tax Act, 1961, as the case may be, by more than 20 per cent, the value of that asset shall, for the purposes of rule 2A, be taken to be its market value. Sub-rule [2] of Rule 2B is not directory in nature, it issues a mandate against the Wealth-tax Officer when it says that if the market value exceeds the book value by 20 per cent or more than the value of the asset would be determined on the strength of the market value. Use of the word "shall" in taxation statute, ordinarily would be taken to be mandatory unless different interpretation can be put to the word so employed by the legislature. From the language of Rule 2B, we are unable to hold that the word "shall" employed either under Sub-rule [1] or sub-rule [2] can be read as "may".

7. Undisputely, the market value of the shares was

exceeding by more than 20 per cent of the book value of the share and if that was so, in accordance with Rule 2B, the Wealth-tax Officer was obliged to consider the market value of the asset. The first action on the part of the Wealth-tax Officer, undisputedly, was in breach of Rule 2B of the Rules and if this illegality came to the notice of the Wealth-tax Officer, then, such illegality could be corrected and the order could be rectified under Section 35 of the Wealth-tax Act, which clearly provides that the Wealth-tax Officer may amend any order passed by him.

8. Present is a case where the officer, when became alive to the wrong committed by him, exercised his jurisdiction under Section 35.

9. So far as the judgment of this Court in the matter of Kikabhai [supra] is concerned, from the facts of the said case, it would appear that the material valuation date for the assessment year was 1962-63. The High Court had focussed its attention to all such provisions of law which were to apply during the period of the

assessment year. The High Court was not required to consider nor it was necessary for the parties to bring to the notice of the High Court that Rule 2B has been brought in the statute book with effect from 1965. Even otherwise, that was not a question for consideration before the High Court. It is trite to say that a judgment is to be read into the context of the facts. The judgment cannot be read as law. A judgment is a judgment on the matter which it decides. A judgment, if does not take into consideration a fact which was not material or necessary, then, it cannot be held that the judgment would be an authority on the question which was never considered by the High Court. In the matter of Kikabhai [supra], the High Court was of the opinion that though Section 7[2][a] of the Wealth-tax Act, 1957 gives an option to the Wealth-tax Officer to adopt the valuation shown in the balance sheet of the business of the assessee making such adjustments in the valuation, as the circumstances of the case may require, he is not bound to adopt the valuation

laid down under Section 7[2][a] in case he decides to go in for the valuation of each asset in that particular business under Section 7[1] of the Act. The case was absolutely different and in any case, the date of the decision would not change the applicability or inapplicability of the law, which, during pendency of the proceedings came into existence.

10. The observations made by the Tribunal that though Rule 2B[2] came into being in the year 1965, but as the judgment of the Gujarat High Court is of September, 1968, the judgment, in case of Kikabhai [supra] shall hold the field. The approach is not illegal, but is perverse and perverse to the extent that no man of reasonable prudence could take such a decision. The questions that whether the value of the shares was to be taken on the book value or on the market value must be decided in favour of the Revenue by holding that in view of Rule 2B[2], the value of the shares as value of the assets was to be taken on the foundation of the market value if there was a difference of 20 per cent

or more in the market value and the book value of the shares/assets. It is also to be held that the Wealth-tax Officer was absolutely justified and was acting within his jurisdiction and competence in exercising his jurisdiction under Section 35 when it came to his notice that the orders passed by him were in patent breach of the mandatory provisions of law.

11. Before parting with the matter, we must inform the Tribunal that while following and observing its earlier judgments or judgments of Courts, it simply cannot say that the facts are identical, therefore, the earlier judgments are being followed. While following the earlier judgments of the Tribunal or of any Court, the Tribunal is always obliged to record the facts of the cases and then come to a conclusion that on the given set of the facts, the earlier judgment would hold the field and cover the lis pending before it. We expect from the Tribunal that henceforth, while observing the earlier judgments of the Tribunal or of the High Court or of the Apex Court, it shall show reasons for

application of the earlier judgments. The observations made by us are not for this case only, but are for the Tribunal when it decides the matters relating to any law.

12. The References are decided in favour of the Revenue. All three References stand disposed of. No costs. Let a copy of this order be sent to the President of the Income-tax Appellate Tribunal for its due observance.

[R.S. GARG, J.]

[M.R. SHAH, J.]